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12 UNITED STATES OF AMERICA
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14 BEFORE THE NATIONAL LABOR RELATIONS BOARD
15
16 DIVISION OF JUDGES
17

18 IN THE MATTER OF:

) Case No. 20-CA-168351
)
)
)

19 NOVATO HEALTHCARE CENTER,

20 Respondent,

) **CHARGING PARTY NATIONAL UNION**
) **OF HEALTHCARE WORKERS' POST-**
) **HEARING BRIEF TO THE**
) **ADMINISTRATIVE LAW JUDGE**
)

21 and

) Hearing Dates:
) August 15-18, September 8, and October 17,
) 2016.
)

22 NATIONAL UNION OF HEALTHCARE
23 WORKERS (NUHW)

24 Charging Party,

) Administrative Law Judge:
) Hon. Amita Baman Tracy
)
)
)

25 *Siegel*
26 *LeWitter*
27 *Malkani*

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3 **I. INTRODUCTION**

4 Novato Healthcare Center (Novato or Respondent) violated Section 8(a)(1) of the Act by
5 discharging five employees who acted on their Section 7 rights and engaged in the most
6 fundamental of protected concerted activities. On the eve of an extremely hard fought
7 representation election that would determine whether about eighty percent of the employees at
8 Respondent's skilled nursing facility would become unionized and represented by Charging Party
9 the National Union of Healthcare Workers (Charging Party or NUHW), the employer
10 discriminatorily and brazenly fired five bargaining unit employees, including four employees who
11 were some of the strongest and most openly pro-union worker leaders at the worksite. A picture
12 of two of the workers allegedly but not actually sleeping "on the job," a picture that was taken by
13 a manager, was somehow immediately distributed in hard copy throughout the facility, such that
14 in the final week before this important election news of the firings of the worker-leaders spread
15 like wildfire and became a primary topic of discussion at the workplace. Moreover, these
16 discharges arose in the context of an employer-sponsored aggressive full court press against
17 unionization, with the employer's efforts including the hiring of five outside consultants to
18 conduct round-the-clock anti-union "education" meetings targeting all unit employees, employer
19 flyers that defamed NUHW's leadership, and even interrogations about union sympathies, threats
20 of job loss, and other coercive conduct by managers and directed at certain employees, including
21 some of the worker leaders who were ultimately discharged.

22 Contrary to Respondent's assertions, this is not a simple case about four employees having
23 a "slumber party" at work. Respondent's assertion that four workers were sleeping on the job
24 does not make that assertion true, and is entirely dependent on the reported account of a manager
25 whose testimony was unclear and didn't make sense. Instead, the record evidence shows no
26 employee wrongdoing, but only that two workers on a night shift closed their eyes during a rest
27 break, as they and many others had in the past. The record evidence further demonstrates that
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1 these four workers were performing their jobs and taking their breaks consistent with all known
2 rules, and consistent with present and past practice, and frankly had no reason to believe and
3 credulously did not believe that their actual conduct was in any way impermissible. The
4 discharged employees were ardent union advocates, the employer's managers actually saw and
5 knew this, and expressed their anti-union sentiment to these and other employees. Moreover, the
6 employer's lack of any written or otherwise communicated or consistent rule about taking rest
7 breaks together, as well as the employer's prior leniency towards employees who engaged in
8 similar or arguably greater objectionable conduct then the conduct of these discriminates,
9 prohibits the employer from meeting its burden of proving that it would have fired these five
10 employees in the absence of protected conduct.

11 **II. FACTUAL BACKGROUND**

13 **A. Respondent's Facility And Operations**

14 Novato Healthcare Center (Novato) is a skilled nursing facility operating in Novato,
15 California. Tr. 560. Darron Truede, Administrator, testified that for eight years, or since August,
16 2008, he has been the most senior employee with "total operational responsibility" at Novato. Tr.
17 30-31, 559-560. In March, 2012, the facility name changed from Country Villa Novato
18 Healthcare Center to its present name but there was no change to the facilities' policies. Tr. 559-
19 560. At time of hearing, Novato housed approximately 181 beds, averaged a total of 160 to 174
20 patients at any given time, and housed about 42 beds at Station 4. Tr. 560-561. At hearing,
21 Novato had about 200 employees, about 160 of which were in the bargaining unit represented by
22 NUHW. Tr. 561-562.

23 **B. The Discriminatees Were Leading The Novato Workers' Collective Efforts to** 24 **Organize For Union Representation by NUHW**

25 Richard Draper is NUHW's Organizing Director for Northern California. Tr. 23. Mr.
26 Draper testified that after workers at Novato contacted NUHW, the Union followed its standard
27 process in organizing campaigns, which included putting together an organizing committee of
28 workers. Tr. 24. At Novato, the members of the organizing committee circulated petitions

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1 seeking NUHW representation, and distributed union branded items, including NUHW lanyards,
2 NUHW pulleys, and NUHW buttons, to coworkers. Tr. 26-28; Exhs. 14(a)-(d). At Novato, this
3 organizing committee included a “core group” of about eight identified workers, including three
4 of the alleged discriminates and Ida Bantilan. Tr. 25-26.

5 As many workers testified, organizing efforts began at the Novato facility in July and
6 gained momentum in August and September of 2015. On September 16, 2015, workers filed a
7 petition with Region 20 of the NLRB seeking representation by NUHW. Joint Exhs. 1
8 (Stipulation 2) and 2 (Petition). A manual ballot election was be held at Novato on October 14
9 and 15, 2015. Joint Exh. 1, Stipulation 3.

10 Ms. Bantilan was one of the main NUHW worker leaders at Novato. She testified that she
11 had over ten years of service working at Novato, where she remained working as a Certified
12 Nursing Assistant (CNA) on the day shift. Tr. 263-264. She learned about NUHW when she they
13 filed the petition, and she spoke with her coworkers in break rooms, and wore an NUHW pulley
14 and NUHW buttons every day during the campaign. Tr. 273-274, and GC Exh. 14(b). She was
15 part of the group of workers who led the campaign for NUHW. Tr. 275. She testified that on the
16 night shift, the “number one” night shift worker who helped her lead the campaign for
17 unionization was Ms. Sabelino. Tr. 276, 291-292. Ms. Bantilan readily identified Ms. Brown as
18 the second worker leader on the night shift. Tr. 276, 292. Four of the five discriminatees in this
19 case were also some of the NUHW’s strongest supporters in this hard-fought campaign to
20 unionize most of the workers at Novato.

21 **C. Employee Rolando Bernales Openly Supported NUHW**

22 Rolando Bernales worked at Novato as a Certified Nursing Assistant (CNA) from July 29,
23 2009, until his discharge on October 12, 2015. Tr. 120. At the time of his termination, Mr.
24 Bernales had worked the night shift, from 11 p.m. to 7 a.m., for about four years. Tr. 120. As a
25 CNA, Mr. Bernales’ duties included checking vital signs, changing diapers, and caring for
26 patient’s needs. Tr. 120. He was one of two CNAs, and cared for about 20-21 patients. Tr. 120-
27 121. He was assigned to work at Station 4. Tr. 123.

28 Mr. Bernales first heard about NUHW from his co-workers in August of 2015. Tr. 124.

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1 He personally attended 2-3 Union meetings at the homes of his co-workers. Tr. 124. Mr.
2 Bernales became a core group member of the Union's organizing committee. Tr. 25-26 (Draper).

3
4 During the campaign, Mr. Bernales openly demonstrated his support for NUHW in many
5 ways. For example, Mr. Bernales testified about how one morning after his shift, in the fourth
6 parking area at Novato, he openly signed the petition for unionization after Ms. Sabelino asked
7 him to do so. Tr. 124-125. After around September 16, 2015, when the petition for the election
8 was filed, Mr. Bernales began openly wearing an NUHW button or pin, and later, also began
9 wearing an NUHW lanyard with his NUHW pin: "I wear it over my uniform so it's on display."
10 Tr. 125-127. Sometimes he wore several NUHW buttons together on his uniform. Tr. 127. He
11 wore this NUHW insignia on most days when he worked. Tr. 127. One night in September of
12 2015, before beginning his night shift, Mr. Bernales distributed pro-union pamphlets to his co-
13 workers in the back of the facility near the parking area. Tr. 127-128.

14 **D. Employee Arlene Brown Openly Supported NUHW**

15 Arlene Brown worked at Novato as a Licensed Vocational Nurse (LVN) or "charge nurse"
16 from September of 2014, until she was discharged on October 12, 2015. Tr. 166. Ms. Brown
17 reported to Florinda Nobleza, the Director of Nursing. Tr. 166. Ms. Brown typically worked the
18 night shift, from 11 p.m. to 7:30 a.m., but sometimes filled in for other shifts. Tr. 167. Her night
19 shift duties including "med passes" or administering medication especially between 11 p.m. to 1
20 a.m. Tr. 167-168. She was assigned to Station 4 together with three CNAs. Tr. 167-168.

21 Ms. Brown first heard about NUHW in July or August of 2015, when she was handed an
22 NUHW flyer. Tr. 169. She attended four to six union meetings, held either at a coworker's home
23 or at the McDonald's, where she was one of the small group of Novato workers who led the
24 campaign to file the petition for unionization. Tr. 169-170. Ms. Brown became a core group
25 member of the Union's organizing committee. Tr. 25-26 (Draper); Tr. 276 (Bantilan).

26 Ms. Brown also very visibly demonstrated her ongoing, strong support for NUHW. Ms.
27 Brown signed the petition for unionization at Station 4. Tr. 170. She herself talked to many
28 coworkers about the union, at "any opportune time," before after and during her shift. Tr. 170-

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1 171. She spoke to her coworkers about employee rights, and asked her coworkers to sign the
2 initial petition to join the union. Tr. 171. She twice handed out pro-NUHW flyers to coworkers
3 as they were arriving in the morning at the facility. Tr. 171. She handed out flyers in a location
4 that made her very visible, in front of the parking lot, in front of the lobby to the facility. Tr. 171-
5 172. During the campaign, Ms. Brown consistently wore and distributed NUHW pins and
6 NUHW lanyards. Tr. 172-173. About twice a week, she wore red shirts and scrubs to work,
7 because red is "the color of the Union." Tr. 173. She spoke with her coworkers about the need to
8 unify in support of NUHW. Tr. 172-173. In sum, Ms. Brown made herself known as one of the
9 most active workers in support of unionization and of NUHW.

10 As described below, at least two managers, Ms. Nobleza and Rachel, the Assistant
11 Director of Nursing, saw Ms. Brown while she was wearing her NUHW pins, NUHW lanyards,
12 and NUHW buttons, and each manager seeing her open NUHW support still boldly, separately
13 told Ms. Brown that it was not a good idea to support the union. Tr. 174-176.

14 **E. Employee Angel Lea Sabelino Openly Supported NUHW**

15 Angel Lea Sabelino worked at Novato from 2008 until her discharge on October 12, 2015.
16 Tr. 209-210. She also worked the night shift, from 11 p.m. to 7 a.m., and at the time of her
17 discharge she was working at Station 4. Tr. 210. Ms. Sabelino was a core group member of the
18 Union's organizing committee. Tr. 25-26 (Draper); Tr. 276 (Bantilan).

19 Ms. Sabelino was one of the NUHW's most active and committed leaders in the campaign
20 for unionization. She first learned about NUHW from a friend in July 2015, and attended four to
21 five union meetings at a coworker's home. Tr. 211. She signed the initial petition for NUHW
22 representation, and then took her efforts one step further by soliciting about 20 co-workers,
23 including Mr. Bernales, to sign the initial petition. Tr. 212 (Sabelino); Tr. 124-125 (Bernales). In
24 soliciting coworkers to sign the petition, Ms. Sabelino spoke to many coworkers about what good
25 the union would do for workers, and how the union would help employees solve worksite
26 problems. Tr. 213. Ms. Sabelino solicited signatures for the petition in breakrooms and in the
27 front parking lot, in the morning after she finished working. Tr. 213. Many managers' offices
28 face the parking lot where Ms. Sabelino solicited signatures. Tr. 213 (Sabelino); Tr. 604

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1 (Truede).

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3 Ms. Sabelino also openly wore an NUHW lanyard with several buttons that clinked
4 against one another, thus drawing attention. Tr. 214, and GC Exh. 9, picture. During the union
5 campaign, Ms. Sabelino wore this lanyard as depicted, with all the buttons, every day. Tr. 214-
6 215. Mr. Truede even saw her wearing this lanyard and buttons. Tr. 218-219. Again, Ms.
7 Sabelino went further in her support of NUHW, by also distributing NUHW lanyards, buttons,
8 and flyers to her coworkers, including giving a NUHW lanyard to Mr. Bernales. Tr. 215-216
9 (Sabelino); Tr. 127 (Bernales). In the morning after her shift ended, Ms. Sabelino distributed
10 these items in break rooms and outside in the front parking lot. Tr. 215-216.

11 **F. Employee Narvius Metellus Openly Supported NUHW**

12 Narvius Metellus worked as a CNA at Novato from February 19, 2015, until his discharge
13 on October 12, 2015. Tr. 294. Mr. Metellus worked on the night shift at Station 4. Tr. 294-295.

14 Mr. Metellus, too, openly demonstrated his support for NUHW. He first heard about
15 NUHW in September, 2015, from Ms. Sabelino, who told him, outside in front of the facility, that
16 NUHW was a union that helped workers, and asked him to sign papers for the union. Tr. 295-
17 296. He also attended two union meetings, and regularly wore to work an NUHW lanyard to hold
18 his badge, outside his clothing, that he got from Ms. Sabelino. Tr. 297-299. Nearly every day at
19 work, usually in the middle of the parking lot in front of the building, he reached out to his
20 coworkers about the Union, handing out flyers and promoting NUHW and speaking of the
21 Union's benefits. Tr. 299-300.

22 Two or three days prior to October 7, while Mr. Metellus was wearing his NUHW lanyard,
23 Respondent's manager named "Gay" or its DSD interrogated Mr. Metellus about whether he
24 supported the Union, asking him how he was going to vote in the Union election. When Mr.
25 Metellus indicated that he would vote yes, the manager asked Mr. Metellus whether he knew that
26 if he voted yes that would have implications about their paychecks and their pay. Tr. 301-304,
27 323. The manager continued, saying that the Union could potentially take a portion of his
28 paycheck. Tr. 305. This manager, the DSD, had never before spoke to Mr. Metellus when she

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1 saw him on the night shift. Tr. 305.

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5 **G. Respondent Aggressively And Vigorously Opposed Unionization At Novato**

6 As Mr. Truede openly admitted, Respondent's position was to oppose Unionization at
7 Novato. Tr. 52, 109. Respondent, including its consultants, its managers, and Mr. Truede
8 himself, distributed numerous flyers to employees, including in person and in break rooms. Tr.
9 58-59, 63-64 (Truede); Tr. 277-278. Exhs. GC 6, 11(a)-(e), 12(a)-(e). The flyers contained clear
10 anti-union messages, including messages asking workers, in the week preceeding the election, to
11 ask NUHW to withdraw its election petition (GC Exh 6), flyers accusing NUHW's President of
12 theft and unlawful acts (GC Exh. 11(a) and 12(a)). There can be no question that Novato made
13 crystal clear to employees its opposition to unionization and to NUHW.

14 Respondent expended substantial resources into opposing union representation. Shortly
15 after learning about the Union campaign, in around September of 2015, Respondent hired five
16 outside labor consultants. Tr. 49-50, 112. Mr. Truede testified that the outside consultants were
17 hired exclusively to provide flyers and "education material" regarding and during the Union
18 election, until about the date of the election on October 14 and 15, 2015. Tr. 36-37, 46-47, 90,
19 112.

20 Initially, Mr. Truede testified that the consultants simply provided "education" to
21 employees, without communicating to employees the employer's position against unionization.
22 Tr. 114. Initially, Mr. Truede even stated that he wasn't sure if the consultants even
23 communicated Respondent's position on unionization to employees: "I don't think they took a
24 position. I think they were simply there to educate." Tr. 114. But Mr. Truede's initial testimony
25 was followed by considerable credible testimony that the consultants held many "antiunion"
26 meetings. Ms. Brown attended these meetings and said that during the meetings they were telling
27 employees why they should not vote for the Union. Tr. 176-177. Ms. Bantilan also attended one
28 of these meetings. Tr. 284-285. Accordingly, when Mr. Truede again testified, he contradicted

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1 his prior testimony, admitting that the education was about the process to "vote no and why" and
2 that he hired the consultants "to keep the building union free." Tr. 576.

3 Respondent went to great efforts, with consultants and managers together launching a full
4 court press, to persuade its workers to attend these numerous, round-the-clock anti-union
5 meetings. Many managers who almost never came to the facility during the night shift made
6 efforts to come talk with workers during the campaign period, including to tell the workers to
7 leave their night shifts in order to go attend the anti-union meetings held by the consultants. For
8 example, Ms. Sabelino's supervisor and Mr. Truede both told her to attend the antiunion
9 meetings. Tr. 217 (Sabelino). Respondent's lead outside consultant, Ms. Carina Hunt, created a
10 sign-up sheet or calendar where Novato's managers signed up to go to particular shifts to
11 "educate" employees about the campaign. Tr. 47, 113 (Truede). The managers were doing rounds
12 through the facility and were telling their staff to go attend one of the antiunion meetings. Tr.
13 176-177 (Brown). Ms. Bantilan's testimony emphasizes the frequency of these meetings: "Every
14 day. Every hour. Every minute. They are asking for a meeting." Tr. 276.

15 One of Respondent's managers, Diane McClain, coercively interrogated Ms. Sabelino
16 about unionization, and then brashly threatened Ms. Sabelino, reminding her as a single mother
17 how difficult it is to find a job. Tr. 219-222, 256. Just days before she was suspended, around
18 October 4 or 6, 2015, Ms. Sabelino was directed alone to Ms. McClain's office. Ms. McClain
19 closed the door, and warned Ms. Sabelino that whatever transpired between them was only
20 between them. Tr. 219-220. Next, Ms. McClain interrogated Ms. Sabelino, asking her if she
21 knew about the union. Tr. 220, 255. Ms. Sabelino was then wearing her NUHW lanyard with
22 multiple NUHW buttons (as pictured in Exhibit 9). Tr. 236. Ms. Sabelino replied that she knew
23 about the union, and had previously worked at a unionized workplace. Tr. 220, 255. The
24 manager asked if Ms. Sabelino was aware that unions asked for dues payments, and Ms. Sabelino
25 stated she did know that and expressed her opinion that the payments weren't that much. Tr. 220.
26 Next, amazingly, Ms. McClain threatened Ms. Sabelino, first noting that Ms. Sabelino was a
27 single mother and then stating, "It's hard to find a job." Tr. 220. Ms. Sabelino testified that she
28 understood this comment, "at the time, that it was threatening me that I might lose a job." Tr.

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1 257-258. After more discussions about unions, Ms. McClain told Ms. Sabelino to keep the
2 conversation to herself and not to tell anyone about what happened between them. Tr. 221-222.

3 Once the union petition was filed, managers were at the facility almost every day,
4 directing workers to leave their shifts to attend the anti-union meetings hosted by the consultants.
5 Tr. 176. Several workers testified that during and only during the campaign, managers who were
6 never present before would now regularly visit workers during the night shift. Tr. 128-129
7 (Bernales). For example, Ms. Brown testified before the union election campaign period, it was
8 "rare" for her supervisor to come to Novato during the night shift, but after the Union petition was
9 filed on September 16, 2015, Ms. Brown's supervisor Ms. Nobleza visited the night shift almost
10 every day. Tr. 173. Ms. Nobleza once told Ms. Brown that "it's not a good idea" to support the
11 Union, because it would take a long time to bargain and settle a contract. Tr. 175. Another
12 manager, Rachel, the Assistant Director of Nursing, approached Ms. Brown at the nurse's station,
13 toward the end of her shift, and also told Ms. Brown that "it's not a good idea to support the
14 union." Tr. 175-176.

15 Mr. Truede himself came to Novato at night and directed workers to attend the anti-union
16 meetings. Tr. 174 (Brown). He told Ms. Brown to attend one meeting while she was in the
17 middle of her med pass duties. Tr. 174 (Brown). He twice told Ms. Sabelino about these
18 meetings. Tr. 216-217 (Sabelino). Even on the morning of October 7, when Mr. Truede was at
19 Station 4, he asked Mr. Bernales to attend an anti-union meeting. Tr. 135 (Bernales).

20 **H. Respondent's Rules Regarding Meal and Rest Breaks for Employees**

21 Mr. Truede testified that all employees working an eight-hour shift, including those on the
22 night shift, are entitled to one thirty minute meal break and two ten minute rest breaks. Tr. 65-66;
23 see also, Tr. 122 (Bernales). While employees must clock in and out for their meal breaks,
24 employees are not required to clock in and out, nor must employees keep track of or document
25 their rest breaks. Tr. 67-68 (Truede); 122-123 (Bernales); 168-169 (Brown); Tr. 210-211
26 (Sabelino).

27 Mr. Truede also testified that employees are allowed to nap or rest their eyes during their
28 thirty-minute meal breaks. Tr. 79. Mr. Truede further testified that on their break, employees

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1 "can do whatever they want." Tr. 80.

2 It appears that napping during one's meal or rest break was an open and common practice
3 for employees working the night shift at Novato. All of the nonsupervisory employees who
4 testified at hearing consistently asserted that they had previously napped during a meal break or
5 rest break, and that no one at Novato ever told the employees that they could not nap during a
6 meal break or rest break. Tr. 141 (Bernales); Tr. 181-182 (Brown); Tr. 235, 240 (Sabelino). Ms.
7 Brown saw coworkers also nap during their breaks at Stations One, Two, and Three, and
8 throughout the facility. Tr. 182, 189-190. Mr. Bernales even testified that he knew employees
9 napped on their meal or rest breaks because he would sometimes see employees go to the lobby to
10 take a nap. Tr. 142.

11 When she testified at hearing, Ida Bantilian had over ten years of service working at
12 Novato, where she remained working as a Certified Nursing Assistant (CNA) on the day shift. Tr.
13 263-264. Ms. Bantilian has worked at Stations 1, 3 and 4, and she worked on the night shift from
14 2007 to 2010, and sometimes still worked the afternoon or night shifts. Tr. 264-265. She
15 testified that when she worked the night shift, she saw coworkers nap on their meal breaks "every
16 day," and sometimes on their rest breaks, usually inside of the nurse's station. Tr. 265-266. She
17 herself napped during both her meal and rest breaks when she worked the night shift. Tr. 268-
18 269.

19 Respondent maintained at hearing that the four discriminates could not take their breaks at
20 the same time, and "should be staggering breaks." Tr. 73. However, it is undisputed that there
21 was no written rule at Novato in any way providing that two or more employees could not take a
22 break at the same time. In fact, the employer produced both an employee handbook containing a
23 section titled "Meal and Rest Periods," and also a separate document titled Meal and Rest Period
24 Policy Acknowledgement. GC Exh. 2, at pp. 14, and GC Exh. 3(a). Neither of these policies
25 places any limits or even speaks to the issue of how many employees per nursing station may take
26 her meal or rest break at a time, and neither of these policies contains any restriction whatsoever
27 regarding multiple employees taking breaks at the same time. Tr. 67-68, 108 (Truede, regarding
28 GC Exh. 2, handbook, at pp. 14). So beyond dispute, there is no written policy prohibiting even

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1 the alleged conduct at issue here.

2 Especially given the lack of any written policy, there was substantial testimony at hearing
3 about what employees at Novato understood to be the rules, if any, regarding the taking or meal or
4 rest breaks. Even when asked, Respondent offered no other documents or testimony showing that
5 it communicated to any of the discriminatees that they could not take their rest breaks at the same
6 time. Tr. 72-73, 89-90 (Treude). Employees admitted coordinating their thirty-minute meal
7 breaks, but understood there to be no prohibition on at least two employees at one station taking
8 their rest breaks at the same time. Tr. 186-187. Ms. Brown testified that she was not aware of
9 any policy that two employees could not take their ten minutes rest break at the same time; in fact,
10 she believed it to be permissible and scheduled it. Tr. 185, 188-189. No one from Novato ever
11 told Ms. Brown that it was not okay to have two employees on a ten minute break at the same
12 time. Tr. 200.

13 Mr. Truede tried to assert that there were limits to where an employee could nap during
14 their breaks. He said that on their breaks, employees could nap or rest their eyes if they were
15 either in the breakroom or in their car or off premises. Tr. 79-80. He claimed he had personally
16 told this to Novato employees "in education or meetings" but no employees have verified that
17 they were so instructed, and there was no evidence that Mr. Truede ever communicated this
18 information to any of the discriminates. Tr. 80. The Novato employee handbook states only,
19 "Rest breaks are limited to areas designated by management." GC Exh. 2, at pp. 14. But there
20 was also no handbook or other clearly communicated written rule restricting where on the
21 premises employees could take their breaks. As noted, some employees even went to the lobby so
22 they could comfortably nap during their meal breaks. Tr. 142. At least at Station 4, in part
23 because the break room was crowded, dirty and fowl-smelling, the past practice was for
24 employees to take their breaks at the nurse's station. "If ever you have a break, you go where you
25 want to go." Tr. 153 (Bernales); ("because the break room is dirty and messy") Tr. 130
26 (Bernales). Ten minutes is hardly sufficient time for an employee working at Station 4 to go off
27 premises or to her car, so with the break room either inaccessible or undesirable, Station 4
28 employees were left with little choice other than to take their rest break at the nurse's station.

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I. What Happened on the Morning of October 7, 2015

Mr. Bernales testified that for the entire time he has worked that shift, he typically took his thirty-minute meal break at the same time every day, from 3:30 to 4 a.m. Tr. 123, 149-150.

During the early morning of October 7, 2015, Mr. Bernales took one ten-minute break between 1 to 1:30 a.m. He later took his thirty-minute meal break at the back of the nurse's station from 3:30 to 4 a.m. Tr. 129-131.

Mr. Bernales testified that on October 7, he did not sleep while on duty. Tr. 141. During his meal break, he sat at the back of the nursing station, resting, closing his eyes sometimes, but not sleeping. Tr. 130-131.

After clocking in from his meal break at 4 a.m., Mr. Bernales went to answer a call light. When he was about to answer the call light, he saw Arlene Brown at the nurses station, writing something, and Ms. Brown said to him: "Take care of the call light. I'm going to take my break in 10 minutes." Tr. 131-133. Thus, Mr. Bernales first went to assist a patient in Room 411 with a diaper change. Tr. 131-132. Mr. Bernales also testified that when he returned from his meal break, around 4 p.m., his coworkers Angel Sabelino was doing paperwork, sitting and writing at the table inside the nurse's station. Tr. 133. His other coworker Narvius Metellus was sitting in front of Room 407, holding some papers. Tr. 134.

Mr. Bernales did not take any other breaks later that morning. Tr. 130. He did his rounds, changing diapers and cleaning all his other patients, until about 6:30 a.m. Tr. 156-157. Around 4:15 or 4:30, Mr. Bernales recalls seeing Ms. Brown and Ms. Sabelino napping at the nurse's station. Tr. 157-158.

Ms. Brown similarly testified that sometime "around 4ish" on the morning of October 7, she took her ten minute rest break. Tr. 177-178, 197. Ms. Brown testified that she sometimes takes a "power nap" during her rest break, and she did so on this occasion as well, at the nurse's station. Tr. 177-178. Ms. Brown also recalled that "[a]round 4:00," she told Mr. Bernales, who had just returned from his break, and Ms. Metellus, that she was going on her break. Tr. 178, 198 (Brown). Ms. Sabelino heard Ms. Brown tell her other two coworkers she was going on break. Tr. 242 (Sabelino). Ms. Sabelino had also informed Ms. Brown that she, too, would take her rest

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1 break. Tr. 185 (Brown); Tr. 225-226 (Sabelino). Ms. Brown took her meal break later that
2 morning, around 5 a.m. Tr. 196-197.

3 Ms. Sabelino also recalled taking a meal break and then a ten minute rest break that day.
4 Tr. 223-224. She spoke with Ms. Brown, speaking in Tagalog, and told Ms. Brown, as she
5 typically did, that she was taking her rest break. Tr. 225-226. This was around 4 a.m. Tr. 238.
6 During her rest break, she closed her eyes, as she typically did during her ten minute rest break.
7 Tr. 224. She took this rest break at the Station 4 nursing station area, seated in a chair, beside Ms.
8 Brown. Tr. 224-225, 238-239. Her jacket, but no pillow, was behind her on her chair. Tr. 238,
9 242.

10 On October 7, Mr. Metellus testified that he clocked out for a meal break but didn't take
11 any other breaks. Tr. 305. He did not nap during his meal break. Tr. 230. He testified that Ms.
12 Sabelino and Ms. Brown each took a rest break because in front of the nursing station, Ms. Brown
13 announced to him, "I'm going to take my ten-minute break, but if anyone needs me, please give
14 me a call." Tr. 307, 324-325. He further testified that Ms. Sabelino also told him she'd be taking
15 a break, asked him to answer the call lights for her, and to call her if needed. Tr. 307-309, 325.
16 Mr. Metellus replied okay, take your ten-minute break, and I'll answer the call lights for Ms.
17 Sabelino. Tr. 309. Mr. Bernales went to a patient's room (either 414 or 415) around the time they
18 had this conversation about going on break. Tr. 310. Soon after Ms. Sabelino and Ms. Brown
19 spoke to Mr. Metellus, he went to assist two patients, one with a bad pan and the other with a bed
20 side commode. Tr. 311-313, 326-327. To give the patient privacy, he sat in a chair in the Station
21 4 hallway, watching the call lights. Tr. 313-316. While seated in the chair, he did not close his
22 eyes. Tr. 320-321. Around this time, after his coworkers told him they were taking their break,
23 and while he was seated in a chair waiting to return to his patients, Mr. Metellus saw a woman he
24 didn't know pass by behind the nurse's station at Station 4, and continue through to the other
25 hallway. Tr. 315. Mr. Metellus estimated the time he saw the woman as being sometime
26 between 4 and 4:10 a.m. Tr. 316.

27 What also had been typical throughout the campaign, was that managers would come in
28 early so that they could campaign to night shift employees about why they should oppose

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1 unionization, and/or to convince the employees to attend the anti-union meetings. As Mr. Truede
2 readily admitted, Ms. Gilman arrived early on the morning of October 7 because she was one of
3 several managers who had signed up to conduct worker "education," to distribute flyers to
4 workers regarding the union campaign, and to tell workers to attend the consultant's meetings.
5 Tr. 574-576 (Truede).

6 None of this was out of the ordinary.

7 What was not typical that day is that later that morning, before their shifts ended at 7 a.m.,
8 Mr. Truede came to the workers asking them if and/or when they had taken their respective
9 breaks. Tr. 177, 195-196 (Brown); Tr. 227-228 (Sabelino); Tr. 316-317 (Metellus); Tr. 577
10 (Truede). Although Ms. Brown wasn't sure to what Mr. Sabelino was referring, she inferred he
11 was asking about her ten-minute rest break, and so Ms. Brown told Mr. Truede that she took her
12 break "around 4ish." Tr. 177. Mr. Bernales and Ms. Sabelino likewise testified that each saw Ms.
13 Teresa Gilman, Kitchen Supervisor, with Mr. Truede later that morning of October 7, in the area
14 near the hallway that is closer to the kitchen, and answered Mr. Truede's questions about their
15 breaks. Tr. 134 (Bernales); Tr. 227 (Sabelino). Ms. Sabelino and Mr. Metellus had never before
16 been asked when she took her break. Tr. 228 (Sabelino); Tr. 317 (Metellus).

17 At hearing, the employer tried to argue that Ms. Sabelino's affidavit, in part, was
18 inconsistent with her testimony at hearing regarding what she told Mr. Truede on the morning of
19 October 7 about her going on break. At hearing, Ms. Sabelino initially testified that she told Mr.
20 Truede that she had had her meal break, but didn't recall whether she had told Mr. Truede whether
21 she had had her rest break. Tr. 227-228. On cross examination, Ms. Sabelino was asked about
22 her affidavit statement that when Mr. Truede asked her if she took her ten minute break, she said
23 she did not remember. Tr. 249. After reviewing her affidavit, Ms. Sabelino affirmed that
24 statement and further explained that she was actually providing patient care so didn't quite
25 respond to Mr. Truede that morning. Tr. 243-249. Moreover, it must be noted that while Ms.
26 Sabelino required a Tagalog interpreter at hearing, her conversation with Mr. Truede on the
27 morning of October 7 was in English. Tr. 261.

28 Mr. Treude's testimony that when asked, all four employees stated when they took a meal

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1 break, and that all denied taking a rest break, is so inconsistent and self-serving on its face as to
2 call into question its veracity. Tr. 577-578, 596.

3 ///

4
5
6 **J. What Happened After The Shift Ended: Just Days Before The Union Election,**
7 **The Photo Taken By Respondent's Manager Of Two Worker Union Leaders**
8 **Was Widely Disseminated Throughout the Bargaining Unit, At the Same**
9 **Time That Those Workers Were Discharged**

10 Respondents assert that the picture of Ms. Brown and Ms. Sabelino allegedly sleeping was
11 taken by Teresa Gilman, Dietary Service Manager, on the morning of October 7. Tr. 562-563
12 (Truede). Later that morning of October 7, Mr. Truede sent an email to all five labor consultants
13 attaching this picture with the subject line reading "GOOD MORNING." Tr. 77-78 (Truede); GC
14 Exh. 16. The consultants were hired exclusively to work on campaign education, and had no
15 involvement in disciplinary matters. Tr. 90-91. Mr. Truede's only explanation of why he sent
16 this picture to persons who were working on the campaign was because he was he claimed
17 "shocked" by what he saw in the picture. Tr. 93-94, 586-587.

18 In the days to follow, the days leading up to the election, workers throughout Novato
19 learned about the suspensions and then terminations as the picture was posted all over the
20 facility—in "the bathroom, the toilet, in the laundry area, in the kitchen." Tr. 180 (Brown).
21 Workers were also texting the picture to one another. Tr. 180-181 (Brown); see also GC Exh. 8,
22 the picture. On October 12, 2012, Ms. Sabelino's her coworker Brenda Bazille told her that the
23 picture of her sleeping was in the laundry room, and was "all over" the nursing station and break
24 room. Tr. 230-231 (Sabelino), and GC Exhibit 8. Ms. Bantilan also testified that the picture was
25 given to her and was distributed "all over the place", even on the refrigerator and microwave,
26 throughout the Novato facility. Tr. 271-272.

27 **K. Respondent's "Investigation" Was Incomplete, Result-Driven In Favor of**
28 **Discharge on the Eve of the Union Election, and Otherwise Tainted With**
Anti-Union Animus

Mr. Truede claimed that the discriminatees conduct was "shocking" and further claimed

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1 that his first thought was to suspend them. Tr. 87. Mr. Truede claimed that he then spoke with
2 outside consultant Josh Sable, and then decided to suspend all the employees. Tr. 582.

3 The discriminatees from Station 4 were all suspended that same day. Later that evening of
4 October 7, each of the discriminatees received a call from Novato's Director of Nursing, Florinda
5 Nobleza, telling them they were being suspended. Tr. 404-407 (Nobleza). Mr. Bernales was told
6 that he was suspended because someone reported him asleep at work. Tr. 137 (Bernales). Ms.
7 Brown was told that she was suspended because someone took a picture when they were sleeping.
8 Tr. 179 (Brown). Ms. Sabelino was told that she was suspended and that someone took a picture
9 of her sleeping, and Ms. Sabelino then protested to Ms. Nobleza that she was on a break. Tr. 228-
10 229 (Sabelino). Ms. Nobleza told Ms. Sabelino that Respondent would conduct an investigation.
11 Tr. 229 (Sabelino). Ms. Nobleza asked Mr. Metellus whether he was sleeping on his shift, which
12 he denied, and she told Mr. Metellus he was suspended and they would do an investigation. Tr.
13 317-318 (Metellus).

14 Respondent alleged that it conducted an investigation, but this so-called investigation left
15 out critical inquiries which Respondent's senior-most managers admit are relevant. For example,
16 Mr. Truede admitted that one factor he generally considers in determining the appropriate level of
17 discipline of an employee is whether the employees were aware of the rule that was allegedly
18 broken. Tr. 96. Yet the investigation relied heavily on Mr. Treude speaking with Ms. Gilman,
19 and involved no inquiry about whether the employees accused of violating these unwritten alleged
20 rules had any idea whatsoever that such "rules" existed at Novato. Tr. 582-588, 594 (Treude).

21 What Respondent did do to "investigate" these allegations is that Ms. Nobleza and another
22 manager held brief two-on-one meetings with each of the four discriminatees from Station 4.
23 However, the meetings included no discussion about what employees understood to be the rules
24 regarding where and when employees took their breaks, whether any breaks must be staggered, or
25 even whether there was any different understanding about the rules for meal and rest breaks.

26 On October 9, Nobleza summoned all four discriminatees from Station 4 to her office at
27 11 a.m. that morning. Each of the discriminatees was made to speak with Nobleza and Rachel
28 separately, for relatively short time periods. Tr. 138 (Bernales); Tr. 179-180 (Brown); Tr. 229-

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1 230 (Sabelino); Tr. 319-320 (Metellus); Tr. 410 (Nobleza). Each of the discriminates described
2 their respective October 9 meetings with Nobleza. Mr. Bernales explained how during his
3 meeting with Nobleza and Rachel, the Assistant Director of Nursing, he explained that if he had
4 even been seen resting, it was during his thirty minute meal break. He asked for the evidence that
5 he was sleeping at work, and was then given none, and was not told what time he was allegedly
6 sleeping. Tr. 139-140. He was told he'd be called back after the investigation. Tr. 140. His
7 meeting was conducted in English and without any interpreter. Tr. 138. Ms. Brown testified that
8 she too met alone with Nobleza and Rachel. Tr. 179. They asked Ms. Brown what she did on her
9 breaks, and Ms. Brown said she slept on her breaks. Tr. 179-180. They suspended Ms. Brown.
10 Tr. 180. During that October 9 conversation, Ms. Brown also told Nobleza and Rachel that the
11 picture of Ms. Brown and Ms. Sabelino was posted all over the facility. Tr. 180.

12 Ms. Sabelino testified that when she met alone with Nobleza and Rachel, she was told
13 about the picture, she explained it was her rest and break time, and Ms. Nobleza replied that she
14 would investigate. Tr. 229-230. Ms. Sabelino was not then shown the picture of her sleeping, but
15 a coworker showed her the picture on October 12, the same day she was fired. Tr. 230-231, and
16 GC Exhibit 8.

17 Mr. Metellus also met alone with Nobleza and Rachel. Tr. 319-320. During the meeting,
18 Nobleza asked Mr. Metellus whether he was sleeping on his shift, saying that someone had
19 reported him. Tr. 320. He explained how he had been tending to patients so while waiting for
20 them sat in a chair, but didn't close his eyes and didn't sleep. Tr. 320.

21 Ms. Nobleza took some notes of Respondent's investigations, but those notes are
22 incomplete and omit several key conversations. Tr. 427-429 (Nobleza). To the extent Ms.
23 Nobleza was part of the investigation and the decision making process, she relied in large part on
24 the information provided to her by Ms. Gilman. Tr. 432-433 (Nobleza). Ms. Nobleza was not
25 focused on the timeframe and didn't make any effort to determine the exact amount of time that
26 Ms. Gilman had been at Station 4 when she reported the workers sleeping. Tr. 433-434
27 (Nobleza).

28 On October 12, 2016, Mr. Truede called each of the discriminatees and one by one, fired

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1 each of them, over the phone. Ms. Brown was fired by voicemail message. Tr. 181. The
2 employees were told only that they were fired effective October 12, and some were told that they
3 were not to enter the Novato premises anymore. Tr. 140 (Bernales); Tr. 181 (Brown); Tr. 232-
4 233 (Sabelino); Tr. 321 (Metellus). When employees asked why they were being fired, Mr.
5 Truede said it was because they were sleeping on duty. Tr. 140 (Bernales).

6 **III. ARGUMENT**

7 **A. The General Counsel Met Its Initial Burden of Proving That Respondent's**
8 **Discharge of Bernales, Brown, Sabelino And Metellus Violated the Act**

9 Section 7 of the National Labor Relations Act (the Act) guarantees employees the right to
10 engage in concerted activity for their mutual aid and protection. 29 U.S.C.A. § 157. Working
11 with one's coworkers to petition for or join a union, is one of the most classic and well-
12 established forms of concerted activity, and goes to the heart of the protections afforded to
13 employees under the NLRA. Section 8(a)(1) of the Act makes it an unlawful employment
14 practice, and thus prohibits employers, from disciplining or discharging employees to
15 interfere with, restrain, or coerce employees who exercise their Section 7 rights.
16 Accordingly, an employer violates the Act when its discipline or discharge of an employee is
17 motivated by employee activity protected by Section 7. 29 U.S.C. §158(a)(1); *CGLM, Inc.*, 350
18 NLRB 974, 980 (2007); *Meyers Industries*, 268 NLRB 493, 497 (1984). Here the employer's
19 threats of discharge and discharge are alleged to violate Sections 8(a)(1) and 8(a)(3) of the
20 Act.

21 Under *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert.*
22 *denied* 455 U.S. 989 (1982), approved *NLRB v. Transportation Management Corp.*, 462 U.S.
23 393 (1983). the Board applies a burden-shifting analysis to determine whether an
24 employer's discharge of an employee was unlawfully motivated. The General Counsel bears
25 an initial burden of establishing, by a preponderance of the evidence, that the employee
26 engaged in concerted activity, that the employer knew about the concerted activity, and that
27 the employer had animus toward the activity. *Grand Canyon University*, 359 NLRB No. 164
28 (2013). Once the General Counsel meets this initial burden, the burden of persuasion shifts

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1 to the employer to establish, by a preponderance of the evidence, that the employer would
2 have taken the same action against the employee in any event, even if the employee had not
3 engaged in protected concerted activity. *Ibid.*; see also, *Lampi LLC*, 327 NLRB 222, 222-223
4 (1998). Thus, the employer has the burden of establishing this affirmative defense.

5 ///

6
7 i. All Station 4 Discriminatees Engaged in Ample Protected Concerted
Activity, and Respondent Knew This

8 First, there is no question that as worker-leaders seeking representation by NUHW, the
9 Station 4 discriminatees were engaged in protected concerted activity. Section 7 of the Act states,
10 in relevant part:

11 Employees shall have the right to self-organization, to form, join, or assist labor
12 organizations, to bargain collectively through representatives of their own
13 choosing, and to engage in other concerted activities for the purpose of collective
14 bargaining or other mutual aid or protection, and shall also have the right to refrain
from any or all such activities.

15 Thus, employees coming together to petition for and campaign for unionization at their workplace
16 is actually explicitly protected by Section 7.

17 Respondent's assertions that it did not know whether any of these employees were pro-
18 union is incredulous, given the overwhelming evidence to the contrary. Tr. 604 (Truede) "Did I
19 know? No."). As detailed above [see Factual Background, including sections II(B) through
20 II(F)], the four discriminatees who testified at trial provided ample evidence that they were openly
21 supportive of NUHW and of unionization, and that Respondent knew this. Ms. Brown and Ms.
22 Sabelino were described as being the first and second most active and involved worker leaders on
23 the night shift, and they each described the great efforts engaged in to bring unionization to
24 Novato. Ms. Brown wore NUHW red scrubs twice a week. All four signed the petition for
25 representation, some including Mr. Bernales did so in open view at Novato, and some solicited
26 coworkers to sign. All four attended union meetings. Ms. Brown, Ms. Sabelino, and and Mr.
27 Bernales were on the Union's core worker organizing committee, which was a relatively smaller
28 group of 8-10 employees in a bargaining unit of about 160 employees. All three also openly

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1 distributed pro-union flyers to coworkers in the parking lot in front of the facility.

2 Furthermore, all Station 4 coworkers, including Mr. Bernales and Mr. Metellus, all
3 testified about how they regularly and very visibly wore NUHW insignia, including NUHW
4 lanyards, NUHW buttons, and even multiple buttons. These items were clearly identified and
5 described and depicted visibly in pictures so that there can be no argument that the wearing of
6 union insignia was in any way subtle or hidden. It was rather, bold and proud and clearly
7 communicated each Station 4 discriminatee's support for the NUHW and for unionization.

8 Finally, there is evidence confirming that Respondent's managers actually saw these
9 employees wearing the NUHW insignia. Respondent's DON and Assistant DON both saw Ms.
10 Brown wearing her NUHW insignia and Ms. Nobleza told her it was not a good idea to support
11 the union. Respondent's other manager, Mr. Rocha, saw Mr. Metellus wearing his NUHW
12 lanyard and interrogated him about his union sympathies, and then tried to persuade him against
13 supporting unionization. Mr. Truede saw Ms. Sabelino wearing her lanyard and buttons, and Mr.
14 Bernales wore his lanyard and button daily, as it framed his identification badge. See GC Exh.
15 14(a).

16 ii. Respondent Had Animus Toward the Protected Activity

17 The Board has held that an employer's expression of antiunion comments similar to those
18 of the Respondent's here, even if not themselves unlawful, nevertheless did establish animus
19 towards its employees' union activities. *Gencorp*, 294 NLRB 717 fn. 1 (second paragraph), 720,
20 731 (1989) (antiunion animus established by, inter alia, employer's statement of union-free
21 philosophy in its employee handbook).

22 Here, Respondent and its managers very openly admitted its opposition to unionization at
23 Novato and to NUHW. Respondent knew these employees were campaigning for unionization,
24 and Respondent didn't like that. Respondent went to great lengths to attempt, in Mr. Truede's
25 own words, "to keep the building union free." Respondent hired five outside consultants, held
26 numerous round-the-clock anti-union meetings, circulated and had its managers circulate
27 numerous flyers that defamed the union and its leadership, and asked workers to seek to postpone
28

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1 the election. Respondent went further, and actually created a schedule for managers to come and
2 “educate” each employee, on each shift, about why they should vote against the union, and to
3 persuade each employee to attend its anti-union consultant-led meetings. Several managers
4 interrogated or otherwise coercively spoke with employees, including to Ms. Sabelino (coercive
5 threats from manager Diane McClain), and Mr. Bernales (interrogation from manager Guy
6 Rocha). Furthermore, Mr. Truede, after seeing that they were wearing UHW insignia, told both
7 Ms. Sabelino and Mr. Metellus to attend an anti-union meeting, thus openly expressing his animus
8 towards each or their respective organizing efforts.

9 There is no question that Respondent aggressively and vigorously opposed unionization at
10 Novato, and also expressed its particular disapproval about unionization to each of the four
11 Station 4 discriminatees.

12 **B. Respondent Cannot Meet Its Burden of Proving That it Would Have Fired**
13 **these Four Employees In The Absence of Protected Conduct**

14 The General Counsel has presented ample evidence to meet its *Wright Line* burden in
15 establishing animus. Now, the *Wright Line* burden shifts to Respondent to argue that it would
16 have discharged all five employees regardless of their protected concerted activity. “Inferences of
17 animus and discriminatory motivation may be warranted under all the circumstances of a case,
18 even without direct evidence. Evidence of suspicious timing, false reasons given in defense,
19 failure to adequately investigate alleged misconduct, departures from past practices, tolerance of
20 behavior for which the employee was fired, and disparate treatment of the discharged employees
21 all support inferences of animus and discriminatory motivation.” *Promedica Health Sys., Inc*
22 (2004) 343 NLRB 1351, 1361, citing to *Adco Electric*, 307 NLRB 1113, 1123 (1992), enfg. 6
23 F.3d 1110 (5th Cir. 1993) (other internal citations omitted). See also, *JAMCO*, 294 NLRB 896,
24 905 (1989) (discriminatory motive may also be established by showing a failure to abide by past
25 practice or disparate treatment).

26 Respondent must now prove, by a preponderance of the evidence, that it treated the
27 discriminatees no differently from the way it treated other employees in similar circumstances.
28 Here, Respondent cannot meet its burden because the record contains no evidence that

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1 Respondent discharged other employees for engaging in conduct similar to the discriminatees.
2 Respondent has presented no credible, admissible comparable evidence that it even issued any
3 final discipline, and certainly not that it discharged, employees who slept, napped, closed their
4 eyes or in any way rested while on their ten-minute rest breaks. If anything, Respondent's own
5 witnesses have admitted that employees who rested or slept during their breaks have historically
6 received no final discipline, and certainly have not been fired.

7
8 i. Respondent's Purported Rationale For Firing All Five Employees Was
9 Pretextual And Discriminatory

10 Mr. Truede testified that he was the final decision-maker in deciding whether or not to
11 terminate these five employees. Tr. 85-86. He testified that outside consultant Mr. Josh Sable
12 also recommended termination, based on the information relayed to Mr. Sable from Mr. Truede.
13 Tr. 95-96. Mr. Truede claimed that he fired the discriminatees because "[t]hey were sleeping at the
14 same time, off break, all four on the same station." Tr. 86, 94, 108-109, 595-596. Mr. Truede
15 admitted that if only one of the employees had been on her break, then she would not have been
16 terminated. Tr. 88, 598. In making this determination, Mr. Truede admitted that he basically
17 disregarded each employee's claim about what she or he was actually doing when allegedly
18 witnessed by Ms. Gilman, and instead completely credited Ms. Gilman's telling of what occurred.
19 This is evident, for example, when Mr. Truede justifies his decision to terminate all four
20 employees referring to "the fact that all four of them were witnessed sleeping." Tr. 597-598. This
21 witnessing can only be from Ms. Gilman. Thus, rather than make any independent or impartial
22 effort to actually determine what occurred, Respondent appeared to be looking simply for any
23 plausible reason to justify its desire to terminate these four employees.

24 Ms. Gilman's testimony demonstrated that she was at minimum unclear, or just erroneous,
25 about the timing of what she saw when, how she made her rounds, and who was allegedly
26 sleeping at what time. Moreover, there is no logical explanation for why if all four employees
27 were actually sleeping at the same time, Ms. Gilman would photograph the two employees she did
28 but not any others. Ms. Gilman claimed at hearing, and had reported to Mr. Truede, that when she

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1 took the sole picture of Ms. Brown and Ms. Sabelino, she didn't take any additional pictures
2 because she was concerned that the noise of taking the picture would wake them up. Tr. 563-564
3 (Treude).¹ If patient safety was in fact the primary concern, she should have awakened the
4 employees or taken other steps to first ensure the safety and security of the patients. Ms. Gilman
5 did not wake them up, and was not disciplined for not waking them up. Tr. 107-108. She is the
6 primary and sole employer witness, and her testimony lacked clarity regarding timing, and in
7 many other ways, simply did not make sense.

8 In contrast to the testimony of Ms. Gilman, Mr. Sable, Mr. Truede, and other of
9 Respondent's representatives, the employees' own testimony was credible and internally quite
10 consistent and illustrated why their conduct did not compromise patient safety. *First, as all four*
11 *State 4 night shift workers consistently testified, on October 7, only two of the four workers were*
12 *taking their breaks at the same time.* Mr. Bernales testified that he and the other CNA, Ms.
13 Sabelino, in fact took their breaks at different times so that one of them was taking care of patients
14 while the other was on break. Tr. 159 (Bernales). They in fact did speak with one another, and
15 made each other aware that the two were taking a break. Mr. Metellus and Mr. Bernales were in
16 fact both working when the photo was taken. There is no credible evidence that all four workers
17 were taking a break, and/or had their eyes closed, at the same time.

18 Respondent's contention was that the conduct of these four discriminatees potentially
19 compromised patient safety because a patient could fall when staff was not there. Tr. 106-107
20 (Truede); Tr. 408 (Nobleza). In this regard, Mr. Bernales testified about how patients who were
21 alert and not sleeping notified him of their needs in different ways. One way patients notified the
22 staff of their needs was by pressing a call button, which then triggers a light outside the room, and

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23 _____
24 ¹ At hearing, Respondent tried to introduce evidence of the time stamp on the photo, but since that
25 time stamp was not known by Respondent until February of 2006, long after Respondent made the
26 decision to discharge, it cannot be used to prove that Respondent would have made the decision
27 had there not been anti-union animus and is thus irrelevant. Furthermore, to the extent
28 Respondent's diagram exhibits include markings made by Mr. Truede based on what he was told
by Ms. Gilman or others, those exhibits are not based on personal knowledge but on hearsay and
accordingly, should be excluded or accorded very minimal if any weight. Tr. 565-572, and
Employer's Exhs. 7, 8; Joint Exh. 3(a) (markings by Truede).

1 also triggers another light and a loud sound at the Nurses Station. Tr. 121-122, 147. The call light
2 is placed beside the patient on the bed. Tr. 148 (Bernales). In addition to the call light, some
3 patients also wear an alarm that is connected to them, that they may push if they need staff
4 assistance. Tr. 163-164. Mr. Bernales also testified that as a CNA, he made rounds every 30-45
5 minutes to check on the patients. Tr. 146.

6
7 ii. Respondent's Disparate Treatment and Animus Towards Employees Who
8 Supported the Union

9 Respondent provided no evidence that any employees were previously disciplined for
10 allegedly sleeping on the job. Respondent could locate no evidence of any such documented
11 discipline from the time period January 1, 2009 through October 31, 2015. Tr. 40-41; see also,
12 Subpoena to Respondent, item 7). None of the non-supervisory employees who testified,
13 including Ms. Bantilan who was not a discriminatee, could recall any other employees being
14 disciplined for resting on their meal break or their rest break. Tr. 136-137 (Bernales); Tr. 182
(Brown); Tr. 269 (Bantilan).

15 Notably, there was evidence that other employees were witnessed by managers allegedly
16 asleep at work, but those other employees received no final discipline, no suspension, and no
17 firing. Rather, the practice of a night shift employee putting one's head down at the nurses's
18 station during a rest break appears to have been determined by the employer in 2009 as conduct
19 insufficient to warrant any final discipline. First, there was evidence that in 2009, an employee
20 was witnessed and photographed with her head down at the desk at a nurses' station. Tr. 81-82;
21 CG Exh. 4. The investigation summary report from that 2009 incident reflects that the employee
22 in question stated that "[s]he will sometimes put her head down at the nurses's station, but only on
23 her break. Other staff interviews revealed that some staff do put their heads down on their break
24 and only during their break times." GC Exh. 4, at pp. 2. The investigation summary report
25 reflects no record of any final suspension or discipline issued to the employee. Tr. 83-84. Mr.
26 Truede initially admitted that if there had been any discipline, it would have been reflected in that
27
28

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1 2009 investigation summary. Tr. 84; GC Exh. 4.²

2 Mr. Truede also initially affirmed that the facility's "past practice," in regard to allegations
3 that employees were asleep, included giving employees an in-service and telling employees that it
4 was fine to take a nap on their breaks. Tr. 84-85. Furthermore, employee Ms. Bantilan testified
5 that in around 2014, about two years before hearing, she openly told the prior Director of Nursing
6 (DON) Ms. Hazel Teczon that she and coworkers napped during their breaks at the nursing
7 station, so that they were near the call lights. Tr. 270-271. She further testified that the then-
8 DON did not give Ms. Bantilan any discipline, or even make her aware of any investigation. Tr.
9 270-272.

10 Finally, there was substantial evidence that employees in the past who engaged in conduct
11 such as failing to properly attach personal alarms to patients, which arguably compromised patient
12 safety, or related to patient safety concerns, did not result in immediate termination but instead
13 was subject to progressive discipline procedures with far lesser consequences than were given to
14 these discharged worker leaders. Mr. Truede could not offer explanations to adequately justify
15 this differential treatment. Tr. 626-641; GC Exhs. 20(a) through 25.

16 Respondent offered the testimony of Faye Seneca, a night shift charge nurse at other
17 Stations. Tr. 360-361. But Ms. Seneca was fired in February, 2016, long after the terminations at
18 issue here occurred, and thus she simply cannot offer any relevant testimony regarding Novato's
19 past practice or even regarding what was in place at Novato when the discriminatees in this matter
20 were fired. Tr. 361, 376, 381 (Seneca). Furthermore, Ms. Seneca's personal experience at Station
21 4, and exposure to current 3Station 4 patients, is limited. Tr. 366. Ms. Seneca's understandings
22 about limits on taking breaks were based on no written policies, but on training from two
23 individuals, which occurred after the discriminatees in this matter were fired and after this case
24 was brought. Tr. 380-381. Ms. Seneca did testify that the CNAs could hear the call lights even if
25 they were asleep. Tr. 390. Moreover, Ms. Seneca testified that she spends her meal and rest

26
27 ² Mr. Truede, the most senior manager at Novato, testified that he gets involved in all discipline
28 from the beginning of the process. Tr. 31. He further testified that Novato uses a standard
disciplinary action form, which is accessible to all of Respondent's managers. Tr. 35.

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1 breaks essentially sitting on-call at the nurse's station, not in the break rooms. Tr. 379-380. Thus,
2 Ms. Seneca, the sole non-supervisory witness offered by Novato, actually testified that she took
3 her meal and rest breaks at the nurse's station, in stark similarity to Ms. Sabelino and Ms. Brown.

4
5 iii. Respondent's Admitted In Writing That They Discharged Employee
6 Gonzala Rodriguez As Collateral Damage To Mask Respondent's
7 Discriminatory Discharges Of Employees Bernales, Brown, Sabelino And
8 Metellus

9 The Board has held that an employer who takes adverse action against a seemingly neutral
10 employee to cover-up adverse actions against employees who are openly pro-union, is also
11 unlawfully violating Section 8(a)(3) of the Act. Here, the employer admitted in writing that it
12 terminated employee Gonzala Rodriguez because to not have done so would have cast suspicion
13 on the other four terminations. See GC Exh. 5. Accordingly, the termination of Ms. Rodriguez
14 was also unlawful.

15 **IV. CONCLUSION**

16
17 For all the foregoing reasons, and the record evidence considered in its entirety, Charging
18 Party respectfully submits that Respondent has violated Section 8(a)(1) and 8(a)(3) of the Act, as
19 alleged in the amended Complaint. Through its conduct, Respondent has infringed upon the most
20 vital and basic of employees' Section 7 rights to engage in concerted activity without employer
21 interference, restraint, and coercion. The testimony at hearing and other record evidence has
22 demonstrated that the General Counsel has met its burden in establishing that Respondent would
23 not have discharged the five discriminatees in the absence of their protected union activities. We
24 request that the ALJ issue appropriate findings of fact and conclusions of law to sustain the
25 allegations in the amended Complaint, and further request that the ALJ order such other relief as
26 may be necessary and appropriate to effectuate the policies and purpose of the Act.
27
28

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1 DATED: December 8, 2016

SIEGEL LEWITTER MALKANI

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3 By:


Latika Malkani

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5 Attorneys for Charging Party NUHW
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PROOF OF SERVICE

I declare that I am employed in the county of Alameda, California. I am over the age of eighteen years and not a party to the within action. My business address is 1939 Harrison Street, Suite 307, Oakland, California 94612.

On December 8, 2016 I served the within document:

**CHARGING PARTY NATIONAL UNION OF HEALTHCARE WORKERS' POST-
HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

on the interested party(ies) herein by sending a true copy as follows:

MARTA NOVOA, ESQ.

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☐ (BY MAIL) Each such envelope, with postage thereon fully prepaid, was placed in the United States mail at Oakland, California. I am readily familiar with this firm's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service pursuant to which practice the correspondence will be deposited with the U.S. Postal Service this same day in the ordinary course of business.

☒ (BY ELECTRONIC MAIL) All of the pages of the above-described document(s) were sent to the recipients listed above via electronic mail, at the respective email address(es) indicated thereon.

☐ (BY HAND DELIVERY) I served the above-described documents on the interested parties listed above by personally hand delivering copies thereof to the address shown above.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 8, 2016 at Oakland, California.


Marnita Wilson

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